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No. 07-440

IN THE

Supreme Court of the United States

WALTER ALLEN ROTHGERY,
Petitioner,

v.

GILLESPIE COUNTY, TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

No court has ever recognized the theory Rothgery asserts, that there is a Sixth Amendment right to continuous representation by counsel, unconnected with any identifiable event constituting a critical stage, from just after the time of arrest. Rothgery's vision of the Sixth Amendment right to counsel is contrary to the Court's long-settled precedent in two key respects: (1) it seeks to quietly overturn *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), by defining a probable-cause determination on a warrantless arrest as the formal initiation of adversary judicial proceedings; and (2) contrary to *Kirby* v. *Illinois*, 406 U.S. 682 (1972), and its progeny, it seeks to decouple appointment from the need for assistance of counsel at a critical stage of proceedings.

The Court has articulated a consistent general rule that the formal initiation of adversary judicial proceedings is the point at which the Sixth Amendment right to the assistance of counsel is triggered. There were only two possible events that Rothgery could claim as a critical proceeding that might entitle him to appointed counsel. Regarding the first, the initial appearance after his arrest, *Gerstein* makes clear that counsel was not required and, in any event, he expressly declined the assistance of counsel. At the second, the appearance after his indictment, he requested and was appointed counsel. There was no event or proceeding anytime between his first and second appearance for which the Constitution required appointment of counsel to Rothgery.

None of the factors that have led the Court to recognize certain limited exceptions to the formal-charges rule for specific, critical stages of prosecution apply because Rothgery's appearance was nonadver-

sarial, nonevidentiary, nonprosecutorial, and held no potential to unfairly prejudice Rothgery's eventual defense to any charge that might ultimately be filed against him. Moreover, without some hearing or event at which the assistance of counsel was constitutionally required (or needed), it is impossible to define an event of attachment that would make the failure to appoint counsel a violation of Rothgery's Sixth Amendment rights.

In advancing his claim, Rothgery is attempting to unmoor the Sixth Amendment from its historical and doctrinal underpinnings, by asking the Court to determine the question of attachment while leaving the underlying question of a constitutional violation completely unaddressed. Indeed, he expressly asks the Court to decide the issue of attachment independent of whether there was a critical proceeding that would require the actual attendance or assistance of counsel. In so doing, Rothgery stands the Court's traditional right-to-counsel jurisprudence on its head by seeking to sever the question of attachment from the inherently connected analysis of whether the Court can identify some critical proceeding at which the assistance of counsel is necessary to protect the defendant's right to a fair trial.

Knowing that he waived his right under Texas law to have counsel present at the article 15.17 appearance, Rothgery never asserted in his complaint that the county (or, more accurately, the state district court) was required to ensure that he had the assistance of counsel when he was magistrated. Instead, Rothgery asserted that counsel should have been appointed for him at some unspecified time after he had been released on bail, without reference

to another critical proceeding at which counsel's presence and assistance was required. Beyond the fact that *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984), makes very clear that a person is not entitled to appointment of counsel to act as a private investigator to begin to develop a defense when no formal charges are pending, there was no defense to prepare. No decision had been made by any prosecutor to bring any charges against Rothgery, much less felony charges. It was entirely possible that the prosecutor could have decided to bring only misdemeanor charges for openly carrying a handgun or no charges at all. Under the circumstances, any attorney appointed in the interim could at most have served as an investigator and precharge negotiator, but the Court has rejected those roles as being covered by the Sixth Amendment right to the assistance of counsel.

When the Court has previously said that the right to the assistance of counsel attaches at or after the initiation of adversary judicial proceedings, it has meant that the right attaches to some proceeding or event at which the assistance of counsel is necessary (like an interrogation or a postindictment lineup), not merely that an obligation to appoint counsel arises out of the ether. By trying to push the event of attachment back to a presentation of warnings that follows every arrest in Texas and to sever the natural bonds between attachment and critical proceedings, Rothgery is attempting to dangerously steer the Court into nonsensically defining the Sixth Amendment trigger in an empty, formalistic way that has no roots in the Court's consistent pronouncements on the appointment of counsel. Such a formalistic rule would not serve the interests of the Sixth Amendment. It would instead further

burden state and local appointment systems without any textual basis in the Sixth Amendment for doing so, without any measurable benefit to the fair-trial interests that underlie the Sixth Amendment right to counsel, and without any material identifiable constitutional problem in the appointment processes that exist throughout the United States.

STATEMENT OF FACTS

On July 14, 2002, Walter Rothgery was fired as manager of the Oakwood RV Park, in Fredericksburg, Texas, and became upset and verbally abusive towards the park's owner. SJ Opp. Ex. 1. The next day, police received a report that Rothgery was walking around the RV park with a pistol, handcuffs, mace, extra bullets, and a knife. *Ibid.* When officers arrived, they found Rothgery in possession of a handgun as well as a long knife. *Ibid.* An instant background check indicated that he was a felon who had been convicted of possession of a controlled substance in California. *Ibid.* Officers then arrested Rothgery on suspicion of being a felon in unlawful possession of a firearm, a third-degree felony. Tex. Penal Code §46.04.

After his arrest, Rothgery was taken to jail, where he was booked, photographed, and then presented to a magistrate.[1] SJ Opp. Ex. 3 at 62, 64-65. According to Rothgery, his initial encounter with the magistrate

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[1] Under Texas law, magistrates include various officials appointed in particular counties by judges in that county. Tex. Code Crim. Proc. art. 2.09. Magistrates are charged with preserving the peace through lawful means, issuing process to prevent and suppress crime, and causing the arrest of offenders. *Id.* art. 2.10. The magistrate Rothgery spoke to was a Gillespie County justice of the peace. SJ Opp. Exs. 3, 4.

occurred at the same time he was being processed from his arrest. *Id.*, at 64 ("[W]hen they were taking my pictures and everything, I turned around to a little glass window and talked to a magistrate."). He appeared before the magistrate again the next morning. Rothgery described his appearance before the magistrate as standing "at a little glass window filling out forms." *Id.*, at 62. At his appearance, Rothgery went through the forms, and the magistrate gave him certain warnings. This appearance before the magistrate, which is sometimes referred to in Texas practice as "a magistration" or "being magistrated," is required under articles 14.06 and 15.17 of the Texas Code of Criminal Procedure, to give every arrestee required information and warnings about his rights. Tex. Code Crim. Proc. arts. 14.06, 15.17.

Through the "little glass window," Rothgery was given a form called a "Warning By Magistrate (Setting Bail & Right to Attorney)." SJ Ex. B. The form informed Rothgery that he had been accused of unlawful possession of a firearm by a felon, but that charges had not yet been filed against him. *Ibid.* (form stating that charges "will be" filed in district court). It informed him of his right to have an attorney present "[i]f peace officers or attorneys representing the state question you," and that "[i]f you cannot afford to hire a lawyer, you have the right to have one appointed." *Ibid.* It next informed him of his right to remain silent, and that any statement he made could be used against him. *Ibid.* It informed him that "[i]n felony cases, you have the right to an examining trial," which is a Texas preindictment procedure in felony cases for assessing the sufficiency of evidence to prosecute. *Ibid.*; see Tex. Code Crim.

Proc. art. 16.01. The form indicated that Rothgery's bond was set at $5,000. SJ Ex. B.

The form also included several certifications by the magistrate. The magistrate certified that, in accordance with state statutory and Fourth Amendment requirements, Rothgery had been brought before him not later than 48 hours after arrest, that the magistrate had informed Rothgery of his rights to an attorney and appointment of an attorney, and that there was a paper record of the magistrate's advising Rothgery of his right to an appointed attorney. *Ibid.* Finally, the magistrate certified, and Rothgery confirmed by initialing, that Rothgery had decided to waive counsel at that time. *Ibid.* Rothgery had, and waived, a Texas statutory right to consult with counsel before his bail was set. See Tex. Code Crim. Proc. art 15.17(a). If Rothgery had requested counsel at that time, Gillespie County procedures provided that counsel would have been appointed for him. SJ Ex. B; SJ Ex. H at 1. The magistrate and the booking officer signed the form at the bottom. SJ Ex. B. Rothgery also signed the bottom of the form, under the title "PERSON WARNED." *Ibid.*

At the same time, the magistrate also reviewed and signed an "Affidavit of Probable Cause" prepared by the arresting officer. SJ Ex. A. The affidavit set forth that witnesses from the trailer park had reported that Rothgery had been carrying a weapons belt, the fact that officers found him carrying a firearm, and that a background check had revealed that he had been convicted in California of felony possession of a controlled substance. *Ibid.* The magistrate's signature certified that, based on the affidavit, probable cause existed for Rothgery's

arrest. *Ibid.* The filing of the probable-cause affidavit to justify a warrantless arrest was insufficient to constitute the filing of formal criminal charges against Rothgery. Felonies may only be formally charged in Texas courts by indictment or, upon waiver of indictment by a defendant, by information. *Teal* v. *State*, 230 S.W.3d 172, 174 (Tex. Crim. App. 2007); *State* v. *Boseman*, 830 S.W.2d 588, 590, n.3 (Tex. Crim. App. 1992).

No one from the Gillespie County prosecutor's office was aware of, much less present at, Rothgery's appearance before the magistrate. Pet. App. at 6. Prosecutors were not aware of the filing or contents of the affidavit of probable cause, and the affidavit did not reflect a decision or commitment by prosecutors to prosecute Rothgery. *Ibid.* Rothgery was not questioned during the appearance, other than to acknowledge that he had received the required warnings. SJ Opp. Ex. 3 at 64. No witnesses were presented or examined, nor was any evidence considered. *Ibid.* After Rothgery was processed, magistrated, bonded, and released, there was no case or charge against him.

Approximately six months passed, during which Rothgery was neither imprisoned nor under indictment. SJ Opp. Ex. 3 at 86. During that period, no investigators or prosecutors contacted Rothgery or communicated with him about his arrest. Rothgery claims to have requested appointment of counsel several times in the period after the initial article 15.17 appearance, but before his indictment, including immediately after the appearance itself.[2]

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[2] There is no evidence of most of these claimed requests other than Rothgery's own testimony, but in the summary-judgment posture of this case, those claims must be taken as true.

SJ Opp. Ex. 3 at 71-72, 86-87. Texas law, in any event, provides that an indigent arrestee out on bail need not be provided with counsel "until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first." Tex. Code Crim. Proc. art. 1.051(j).

The Gillespie County prosecutor's office, after eventually reviewing Rothgery's file, decided to indict and prosecute him. On the afternoon of January 17, 2003, a grand jury indicted Rothgery for being a felon in possession of a firearm. SJ Opp. Ex. 9. A capias then issued for Rothgery, which, unlike the prior affidavit of probable cause, clearly indicated that Rothgery had been indicted for unlawful possession by a felon. SJ Ex. C. Rothgery was rearrested on January 18, 2003. On January 19, he was again magistrated based on the second arrest. The warning form from the second magistration, unlike that from the first, indicated that he had been accused of a criminal offense that had been filed in the district court. SJ Ex. E. The form also, unlike the first one, indicated that Rothgery had requested the appointment of counsel. *Ibid.*[3]

On January 23, Gillespie County received a request for counsel from Rothgery and faxed it to the district judge, who promptly appointed counsel for him. SJ Ex. F. The three business days that passed before the judge appointed counsel for Rothgery complied with Texas law and with Gillespie County's plan for appointing counsel. (January 18th and 19th were

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[3] The form itself was identical; the differences were indicated by strikethroughs and the checking of different boxes on the form.

weekend days, and January 20th was a holiday.) See Tex. Code Crim. Proc. art. 1.051(i).

After being appointed, Rothgery's lawyer began working on the file on January 31, and first consulted with Rothgery on February 9. SJ Opp. Ex. 13. The lawyer ultimately secured paperwork indicating that Rothgery had been allowed to withdraw his guilty pleas in his California case after completing a diversionary program. SJ Opp. Ex. 14; Pet. App. at 2. The indictment against Rothgery was ultimately dismissed.

Rothgery sued Gillespie County under 42 U.S.C. §1983, seeking damages for the county's not appointing him counsel during the months between his initial magistration and his indictment. Compl. at 8-10. He claimed that the County had a policy of not appointing counsel for arrestees released from jail on bond and that this policy violated his Sixth and Fourteenth Amendment rights. Pet. App. at 4.

Gillespie County moved for summary judgment on numerous grounds. Mot. for SJ at 3-10. The district court dismissed the case on the ground that Rothgery's right to counsel did not attach until he was indicted by the State and the Fifth Circuit affirmed. Pet. App. at 4, 12.

The Fifth Circuit, applying this Court's precedents along with its own, focused on whether the article 15.17 magistration marked the commencement of adversarial judicial proceedings against Rothgery and concluded it had not. Pet. App. at 12. In particular, the court concluded that the State had not committed to prosecute Rothgery. *Id.*, at 6 (citing Tex. Code Crim. Proc. art. 2.13). Rothgery then

petitioned for certiorari, and the Court granted review.

SUMMARY OF ARGUMENT

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const., Amdt. 6. Because the right is textually limited to actual criminal prosecutions, the right to counsel attaches "only at or after the time that adversary judicial proceedings have been initiated against" an arrestee. *Kirby*, 406 U.S., at 688. Rothgery's magistration did not initiate adversary judicial proceedings against him.

The Fifth Circuit, consistent with this Court's jurisprudence on the Sixth Amendment right to the assistance of counsel, held that adversarial judicial proceedings begin when the government commits to prosecution. Because the core purpose of the Sixth Amendment guarantee of the accused's right to assistance of counsel is to preserve his right to a fair trial by "protecting the unaided layman at critical confrontations with his adversary," *Gouveia*, 467 U.S., at 189, the determinative fact must be whether the State has become the adversary of the accused. The Court has consistently followed the general rule that adversary judicial proceedings begin with the filing or presentation of formal charges, and in deciding whether to recognize exceptions has consistently applied an analysis that considers whether the State has actually become the adversary of the accused. That condition was simply not met by Rothgery's initial article 15.17 appearance, which was a fundamentally nonadversarial proceeding.

Rothgery's appearance before the magistrate included the probable-cause determination required by *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), statutory warnings required by article 15.17, and the setting of bail. Nothing during that appearance initiated adversary judicial proceedings, nor was any of it a critical stage of criminal proceedings. Combining them into one hearing cannot change that conclusion. The appearance was nonadversarial, administrative, occurred before the filing of any formal charges, provided no opportunity for examination of witnesses or other interaction between Rothgery and the State, and had no possible effect on Rothgery's right to a fair trial on any charges that might ultimately be brought against him. When it concluded, Rothgery was free on bail. There was no case, no charge, and no decision had been taken to prosecute—indeed the prosecutor was not even aware of the arrest or its circumstances.

Moreover, six months of inaction followed. Nothing in this Court's cases suggests or holds, as Rothgery contends, that an accused has a constitutional right to appointment of counsel as soon as adverse proceedings begin even when no critical event such as an interrogation intervenes. Thus, even if Rothgery's article 15.17 magistration had initiated adversary judicial proceedings, counsel was appointed for him well in advance of any critical stage of the prosecution, so there was in any event no violation of his right to counsel.

Rothgery's proposed standard is contrary to the Court's cases, unworkable, and unwise. The Sixth Amendment does not require the appointment of counsel to give a defendant a running head start on the prosecution before prosecution is even begun.

Instead the Court has firmly rejected that proposition, making clear that "our cases have never suggested that the purpose of the right to counsel is to provide a defendant with a preindictment private investigator." *Gouveia,* 467 U.S., at 191. But that is exactly what Rothgery proposes—that his rights were violated by not having a lawyer appointed to conduct an investigation to prevent him from being indicted (because it is uncontested that, once he was indicted, he was timely provided with a lawyer, and the charges were ultimately dismissed).

Accepting Rothgery's position would call into question numerous precedents of this Court by functionally extending the Sixth Amendment right to counsel virtually to the point of arrest. It would, further, do so for no good reason, given that the interests Rothgery is seeking to vindicate are already protected by other rights such as the Fourth Amendment right against unlawful seizures, the Fifth Amendment right against self-incrimination, the Sixth Amendment right to a speedy trial, statutes of limitations, speedy-trial statutes, and statutes (like Texas's) that ensure assistance of counsel for persons held in custody. Moreover, accepting Rothgery's contention would cause widespread practical harm to law enforcement and local authorities, and visit substantial new costs on counties in Texas and elsewhere if forced to appoint and pay for counsel prior to indictment even when no critical proceedings are taking place. It would extend the Sixth Amendment right to counsel to the routine, administrative events accompanying the processing of a suspect immediately after arrest, and even possibly back to the point of arrest itself.

ARGUMENT

I. THE SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL PROTECTS AN ACCUSED'S RIGHT TO A FAIR TRIAL.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const., Amdt. 6. The "core purpose" of the right to counsel has long been recognized as "assur[ing] 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U.S. 300, 309 (1973). Thus, the right to counsel "has been accorded . . . not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Mickens* v. *Taylor*, 535 U.S. 162, 165 (2002) (quotation omitted). The amendment's text reflects the Framers' historical motivations for rejecting the English common-law rule denying counsel to accused felons, particularly a solicitude for unaided laymen confronted by an intricate procedural system and "a desire to minimize imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *Ash*, 413 U.S., at 307-309.

The Court's modern Sixth Amendment jurisprudence has consistently focused on preserving the right to a fair trial by ensuring that an accused has the assistance of counsel during critical stages of postindictment, pretrial proceedings. In *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932), the Court laid out this concern:

> "during perhaps the most critical period of the proceedings against the[] defendants, that is to

> say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Id.*, at 57.

Following *Powell*, the Court recognized that the right to counsel encompassed pretrial events and proceedings at which the absence of counsel might derogate from a subsequent fair trial. These proceedings included arraignments at which defenses must either be raised or waived, *Hamilton* v. *Alabama*, 368 U.S. 52, 53-54 (1961), entry of a plea, *White* v. *Maryland*, 373 U.S. 59, 59 (1963) (*per curiam*), and postindictment lineups, *United States* v. *Wade*, 388 U.S. 218, 236-237 (1967). All of these cases, and others decided by the Court, recognized the right to counsel for proceedings that took place after the filing of formal charges—that is, the initiation of the "criminal prosecution" described by the Sixth Amendment. And each of them was firmly rooted in the commitment to protecting the right to a fair trial. See, *e.g.*, *id.*, at 224. The Court for the first time in *Coleman* v. *Alabama* recognized a right to counsel for a proceeding that preceded the filing of formal charges: adversarial preliminary hearings at which defendants were afforded an opportunity to cross-examine the witnesses against them, 399 U.S. 1, 9-10 (1970) (plurality opinion).

Throughout these cases, the touchstone remained the right to a fair trial. Thus, the Court clearly stated the proper test to determine whether the right to counsel should be extended to cover a particular

pretrial proceeding: A federal court must, first, "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself," and, second, "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Wade*, 388 U.S., at 227. When the absence of counsel from a particular confrontation would prejudice the fair-trial right, the Sixth Amendment right attaches "to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." *Ibid.*

The Court also, in parallel with these cases, beginning with *Massiah* v. *United States*, 377 U.S. 201 (1964), and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), developed a right-to-counsel jurisprudence focused on protecting the accused's rights not to prejudice his defense through communications with police and prosecutors. The "prime purpose" of right-to-counsel cases in this context was "not to vindicate the constitutional right to counsel as such, but, like *Miranda* [v. *Arizona*, 384 U.S. 436 (1966)], to guarantee full effectuation of the privilege against self-incrimination." *Kirby*, 406 U.S., at 689 (quoting *Johnson* v. *New Jersey*, 384 U.S. 719, 729 (1966)). Thus, the Court developed a test to evaluate whether police communications with an accused violate the accused's Sixth Amendment rights, which looks to whether police have deliberately elicited incriminating statements from an accused. See, *e.g.*, *Fellers* v. *United States*, 540 U.S. 519, 523-524 (2004) (collecting cases). That test is related to, but

"expressly distinguished" from, "the Fifth Amendment custodial-interrogation standard." *Ibid.* (citing *Michigan* v. *Jackson*, 475 U.S. 625, 632, n.5 (1986)).

In subsequent cases, the Court has applied these fundamental principles to answer new questions about whether the Sixth Amendment right to counsel extended to other sorts of proceedings, but always has hewed to the bedrock principle of protecting the ultimate right to a fair trial by providing assistance after the initiation of criminal prosecution for those proceedings that could affect the ultimate fairness of the trial. Thus, the Court rejected the extension of the right to preindictment lineups in *Kirby*, 406 U.S., at 689-690. In doing so, the Court declared that "the initiation of adversary judicial criminal proceedings" marked "the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id.*, at 689-690. The Court also rejected the extension of the Sixth Amendment guarantee to a prosecutor's interview with an identification witness using a photographic display that included a picture of the defendant. *Ash*, 413 U.S., at 321. The Court rejected the expansion because there was no possibility the accused would be misled on the law or otherwise "overpowered by his professional adversary," and providing counsel under such circumstances would not "produce equality in a trial-like adversary confrontation." *Id.*, at 317.

Similarly, the Court rejected the extension of the guarantee to counsel to the probable-cause determination following a warrantless arrest. *Gerstein*, 420 U.S., at 122-123. And, finally, in *Gouveia*, the Court rejected the argument that preindictment detention alone triggers the

appointment of counsel, reaffirming that it has "never held that the right to counsel attaches at the time of arrest" or "suggested that the purpose of the right to counsel is to provide a defendant with a preindictment private investigator." *Gouveia*, 467 U.S., at 190, 191.

There have been few significant attempts since *Gouveia* to expand the formal pretrial proceedings to which the right to counsel applies, and few cases in this Court since then addressing the scope of the right. This quiescence indicates the broad acceptance, and demonstrated practical workability, of the settled doctrine that Rothgery seeks to alter: Sixth Amendment rights attach "at the initiation of adversary judicial criminal proceedings" and require appointing counsel at "certain 'critical' pretrial proceedings" that follow or coincide with initiation. *Id.*, at 189. The right to counsel entitles an accused to the "guiding hand of counsel," *Hamilton*, 368 U.S., at 54, at all points during a prosecution when "counsel's absence might derogate from the accused's right to a fair trial," *Wade*, 388 U.S., at 226. Importantly, the right to counsel "[i]s not implicated, as a general matter, in the absence of some effect of the challenged conduct on the trial process itself." *Michigan* v. *Harvey*, 494 U.S. 344, 363 (1990) (Stevens, J., dissenting); see also *Ash*, 413 U.S., at 311 ("The Court consistently . . . has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself."). And "the right to the assistance of counsel is shaped by the need for the assistance of counsel," *Maine* v. *Moulton*, 474 U.S. 159, 170 (1985), and so requires a "pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding and the

dangers to the accused of proceeding without counsel." *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988).

Certain events to which the guarantee of counsel applies require preparation, so it may be necessary to appoint counsel before such critical stages, and the more preparation required, the further in advance the appointment must be made. See *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940). But the Sixth Amendment right does not require establishing an attorney-client relationship from the first instant of pretrial confinement in order to fend off future indictment and prosecution. *Gouveia*, 467 U.S., at 191. This is because the right to counsel does not in the first instance directly protect citizens' liberty interests; citizens' liberty is protected by the Fourth Amendment's prohibition on unreasonable seizures and the Sixth Amendment guarantee of a speedy trial. *Ibid.*; *Gerstein*, 420 U.S., at 124-125; see *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 241 (1973) ("There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment."). Instead, the right to counsel protects personal liberty only indirectly, by ensuring that substantial deprivations of liberty—those that would be unreasonable under the Fourth Amendment because of their duration—may only be imposed by the State following a fair trial. See *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938).

II. THE PREINDICTMENT ARTICLE 15.17 MAGISTRATION DID NOT CONSTITUTIONALLY ENTITLE ROTHGERY TO THE ASSISTANCE OF COUNSEL.

A. Formal Criminal Proceedings Had Not Begun.

Kirby v. *Illinois* "firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." 406 U.S., at 688. *Kirby* thus affirmed the general rule that the right to counsel attaches at the point that formal charges are filed. See *Harvey*, 494 U.S., at 358, n.5 (Stevens, J., dissenting) ("[T]he 'criminal prosecution' to which the Sixth Amendment refers begins when formal charges are filed."). In Rothgery's case, it cannot reasonably be disputed that there was no criminal prosecution at the time of his arrest and magistration. There were no charges filed or pending, and the affidavit of probable cause filed by the arresting police officer was unquestionably insufficient as a formal charging instrument under controlling Texas law. SJ Ex. A. The preliminary character of this stage of the investigation failed to satisfy the Sixth Amendment's textual prerequisite for the right to counsel—existence of a criminal prosecution. Therefore, "consistent . . . with the literal language of the Amendment, which requires the existence of both a 'criminal prosecutio[n]' and an 'accused,'" *Gouveia*, 467 U.S., at 188 (alteration in original), Rothgery derived no right to counsel from his preindictment article 15.17 appearance.

In Texas, the filing of a probable-cause affidavit to justify a warrantless arrest does not constitute the

filing of formal criminal charges against a suspect. "The Texas Constitution requires that, unless waived by the defendant, the State must obtain a grand jury indictment in a felony case." *Teal* v. *State*, 230 S.W.3d, at 174; see Tex. Const., Art. I, §10. Felonies thus may only be formally charged in Texas courts by indictment or, upon waiver, by information.[4] An indictment is "the written statement of a grand jury accusing a person therein named," Tex. Code Crim. Proc. art. 21.01; it must, at a minimum, satisfy nine formal requirements specified by statute, *id.* art. 21.02. An information, which must be "filed and presented in behalf of the State [of Texas] by the district or county attorney," *id.* art. 21.20, must comport with a similar list of formal requirements, including "[t]hat it appear to have been presented by the proper officer," *id.* art. 21.21(3).

The probable-cause affidavit filed to document the justification for Rothgery's warrantless arrest cannot constitute a formal felony charging document in Texas courts. It is plainly neither an indictment nor an information, and so it could not formally charge Rothgery with a felony under Texas law. See Tex. Const., Art. I, §10. Nor could anything else in an article 15.17 appearance following warrantless arrest be interpreted as constituting a formal charge.

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[4] Complaints, which are affidavits sworn before a magistrate in support of an arrest warrant, may play a role in signaling a commitment to prosecute, when filed by a district or county attorney, but they are not themselves formal charging documents. See Tex. Code Crim. Proc. art. 15.04. "[T]he process of prosecution is usually initiated by the filing of a criminal 'complaint.' But the complaint in [felony] proceedings will serve only as a basis for the issuance of an information or the commencement of the indictment process." *Boseman*, 830 S.W.2d, at 591; see Tex. Code Crim. Proc. art. 21.22.

Indeed, Rothgery was directly told that he had not yet been charged. SJ Ex. B.

In light of the absence of any formal charge in this case, it is clear that Rothgery's article 15.17 appearance did not constitute one of the "criminal prosecutions" to which the Sixth Amendment is limited. U.S. Const., Amdt. 6. "It is the commencement of a formal prosecution, indicated by the initiation of adversary judicial proceedings, that marks the beginning of the Sixth Amendment right." *Texas* v. *Cobb*, 532 U.S. 162, 176 (2001) (Kennedy, J., concurring). Arrest and detention alone are insufficient to activate the Sixth Amendment's protections, because they are investigatory steps that precede the beginning of an actual criminal prosecution. In contrast, the prosecutions that do implicate the amendment are inextricably linked to the formal charging processes that define their initiation. See *Harvey*, 494 U.S., at 358, n.5 (Stevens, J., dissenting). "[T]he literal language of the Amendment . . . requires the existence of both a 'criminal prosecutio[n]' and an 'accused,'" *Gouveia*, 467 U.S., at 188, but neither exists at the time of an article 15.17 appearance following a warrantless arrest.

B. The Right to Counsel Did Not Attach Because There Was No Commitment to Prosecute at the Time of Rothgery's Preindictment Magistration.

While in *Kirby* the Court generally considered the right to counsel to be "historically and rationally applicable only after the onset of formal prosecutorial proceedings," 406 U.S., at 690, it has also pragmatically recognized that the need to extend the

right may arise "from changing patterns of criminal procedure and investigation that . . . tend[] to generate pretrial events that might appropriately be considered to be parts of the trial itself," *Ash*, 413 U.S., at 310.

Kirby accordingly provided a functional analysis for determining whether a specific preindictment event so implicated a suspect's right to a fair trial that it merited the protection of the right to counsel. The Sixth Amendment right to counsel attaches, and adversary judicial proceedings are initiated, when "the government has committed itself to prosecute," and "the adverse positions of government and defendant have solidified." *Kirby*, 406 U.S., at 689.[5] "It is then that a defendant finds himself faced with the prosecutorial forces of organized society" and is "immersed in the intricacies of substantive and procedural criminal law."[6] *Ibid.*; cf. *Johnson* v.

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[5] See also *State* v. *Pierre*, 277 Conn. 42, 95, 890 A.2d 474, 507 (2006) ("[W]e conclude that it is not simply the signing of the information document that triggers the protections of the sixth amendment. Rather, it is the state's decision to move forward with the prosecution of the crimes charged in the information document, by arraigning the suspect and filing the information with the court, that signifies the state's commitment to prosecute as well as the initiation of the adversary judicial proceedings that trigger a defendant's right to counsel under the sixth amendment."); *State* v. *Masaniai*, 63 Haw. 354, 360-361, 628 P.2d 1018, 1023 (1981) (finding no attachment of right to counsel after arrest pursuant to warrant because there had been no prosecutorial involvement in procuring the warrant).

[6] Rothgery's proposed bright-line test, which would find attachment of the right to counsel at any initial appearance before a magistrate, would essentially nullify *Kirby*'s extended discussion of why the test for attachment is not "a mere formalism." See 406 U.S., at 689-690. Nor is this nullifying effect limited to *Kirby*. *E.g.*, *Moran* v. *Burbine*, 475 U.S. 412,

Zerbst, 304 U.S., at 463 ("It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel.*" (emphasis added)). Specific applications of this functional analysis have resulted in the recognition of the right to counsel for a very limited set of specific preindictment situations, including adversarial preliminary hearings. See, *e.g.*, *Coleman*, 399 U.S., at 9-10. But applying *Kirby*'s functional analysis to Rothgery's preindictment article 15.17 appearance makes clear, as the Fifth Circuit correctly determined, that the right to counsel had not attached.

"[U]ntil such time as the 'government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified' the Sixth Amendment right to counsel does not attach." *Moran* v. *Burbine*, 475 U.S. 412, 432 (1986) (quoting *Gouveia*, 467 U.S., at 189). Any possible claim that the State was committed to prosecuting Rothgery is undermined by the tentative, administrative, and preliminary nature of the article 15.17 appearance and by the uncontested fact that prosecutors had not even considered charging, let alone formally charged, Rothgery at the time of his appearance. Pet. App. at 6. The article 15.17 appearance, which follows every arrest in Texas, fails every aspect of the functional analysis *Kirby* prescribes for events before the filing of formal charges.

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432 (1986); *Gouveia*, 467 U.S., at 189; *Ash*, 413 U.S., at 310; see also Part III *infra*.

First, the government had not committed itself to prosecute. There is no role for a prosecutor either in the process preceding an article 15.17 appearance or at the appearance itself. It is thus impossible to argue that the State commits itself to prosecute at every such appearance following a warrantless arrest. Indeed, given that state law requires such an appearance for every arrestee, see Tex. Code Crim. Proc. arts. 14.06, 15.17, that argument amounts to the claim that the State has statutorily committed to prosecute *every* suspect arrested by the police. That claim is implausible and directly contrary to Texas law and practice. In Texas, as elsewhere, the decision whether or not to initiate a prosecution remains "the *quintessential function* of a prosecutor." *Clawson* v. *Wharton County*, 941 S.W.2d 267, 272 (Tex. App. 1996) (emphasis added); accord Tex. Code Crim. Proc. arts. 2.01, 2.02 (providing that district and county attorneys represent the State in criminal cases). Prosecutors unquestionably played no role in Rothgery's case before or at his article 15.17 appearance. See Pet. App. at 6.

Nor is this conclusion changed by the arresting officer's affidavit of probable cause that was approved by the magistrate. SJ Ex. A. Because the probable-cause determination does not commit the State to prosecute, it does not cause the right to counsel to attach. The officer's providing evidence to a neutral magistrate is required to justify any warrantless detention under *Gerstein*. 420 U.S., at 114. *Gerstein* requires specification of an offense: "The standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Id.*, at 111 (quotation, alteration omitted). But *Gerstein* also

makes very clear that "[b]ecause of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel." *Id.*, at 122. Exercising prosecutorial discretion is a key function of a district or county prosecutor, and the State cannot be committed to prosecuting by a police officer's decision to detain a suspect on probable cause. And, since the probable-cause determination does not reflect a commitment to prosecute, it does not require the immediate appointment of counsel. *Ibid.*; *Kirby*, 406 U.S., at 689.[7]

Second, the adverse positions of the State and the suspect have not solidified at the point of an article 15.17 appearance following a warrantless arrest. Even if a prosecutor had considered whether to bring charges prior to such an appearance, the precise nature of the charges to be filed could well remain unclear. See *State* v. *Tucker*, 137 N.J. 259, 290, 645 A.2d 111, 127 (1994) (noting that even after the filing of a criminal complaint roughly half of all cases are dismissed, downgraded, or diverted to pretrial intervention programs). Based on what the police knew, Rothgery could have been charged, as he eventually was, with the felony of unlawful possession of a firearm by a felon, Tex. Penal Code §46.04, but he might also have been charged with the distinct misdemeanor of unlawful carrying of a

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[7] *State* v. *Luton*, 83 Haw. 443, 449-450, 927 P.2d 844, 850-851 (1996) ("The prosecution does not initiate charges against a defendant at a [*Gerstein* hearing], a non-adversarial proceeding which serves only to determine if future incarceration is warranted."); *id.*, at 450, n.17, 927 P.2d, at 851, n.17 (citing cases from other jurisdictions reaching similar holdings).

weapon regardless of his criminal record, *id.* §46.02. Because of the offense-specific nature of the Sixth Amendment right to counsel, such uncertainty has critical effects on the scope of the right itself, as well as on the responsibilities of police and prosecutors after the right attaches. See *Cobb*, 532 U.S., at 167-168. Indeed, had Rothgery been charged with the alternative misdemeanor count instead, he would have had no constitutional right to appointed counsel, unless he was later sentenced to a term of imprisonment after being convicted of that charge. See *Scott* v. *Illinois*, 440 U.S. 367, 369 (1979). The fact that no prosecutor had chosen from among the potential charges in Rothgery's case makes clear that the government's position toward him had not solidified at the time of his initial article 15.17 appearance.

Third, the article 15.17 appearance is not one at which the arrestee "finds himself faced with the prosecutorial forces of organized society." *Kirby*, 406 U.S., at 689. As with every Texas arrestee, Rothgery's article 15.17 appearance was a primarily administrative matter. He stood in front of a "little glass window," filled out forms, and listened to the magistrate give him various warnings required by *Miranda* and Texas law.[8] SJ Opp. Ex. 3 at 64. No prosecutorial forces of any sort were arrayed against him at the little glass window when he stood before the magistrate. Pet. App. at 6. And more generally, consistent with *Gerstein*, the article 15.17 appearance

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[8] The magistrate also reviewed the affidavit submitted by the arresting officer and concluded that it was sufficient to establish probable cause, although it is not clear whether he did so immediately before or while Rothgery appeared before him. Tex. Code Crim. Proc. art. 15.17; SJ Ex. A.

is nonadversarial, includes no examination or cross-examination of witnesses, and risks no prejudice to any rights of the suspect affecting a fair trial. These same "critical factors" led the Court in *Gerstein* to distinguish probable-cause hearings from the preliminary hearings described in *Coleman* v. *Alabama*, and conclude that no right to counsel attached to them. See *Gerstein*, 420 U.S., at 122-123.

Finally, an article 15.17 magistration does not immerse the accused in "the intricacies of substantive and procedural criminal law," *Kirby*, 406 U.S., at 689, or subject him to "a trial-like adversary confrontation" to which the right to counsel ought be extended, *Ash*, 413 U.S., at 317. Rothgery, like other suspects given warnings under article 15.17, merely received a summary of his procedural rights, including his *Miranda* rights to counsel and to remain silent, his right to request the appointment of counsel, and his right to challenge the probable cause to charge him at an examining trial.[9] See Tex. Code Crim. Proc. art 15.17(a) (prescribing warnings to be addressed to the arrestee); SJ Ex. B. Rothgery was not, and no other suspect at an article 15.17 magistration is, placed into a position in which his lack of legal knowledge could have any prejudicial effect on his right to a fair trial, should he eventually be formally charged.

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[9] The examining trial is the procedure under Texas law by which an accused may choose to challenge the existence of probable cause to charge him with a crime. Tex. Code Crim. Proc. art. 16.01. It is an adversarial preliminary hearing at which witnesses may be examined and cross-examined, with the same rules of evidence as apply at trial, in the presence of the accused. *Id.* arts. 16.06-16.08. The accused's right to counsel at an examining trial is guaranteed both statutorily, *id.* art. 16.01, and constitutionally, see *Coleman*, 399 U.S., at 9-10.

When this Court has extended the right to counsel, it has been after "a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson*, 487 U.S., at 298. The four practical criteria noted by *Kirby* guide this assessment, and the fact that they clearly do not apply dictates that an article 15.17 appearance following warrantless arrest is not one of those pretrial proceedings that mark the initiation of adversary judicial proceedings.

In contrast, adversarial preindictment proceedings, like the preliminary hearing considered in *Coleman*, are an example of the type of proceedings that satisfy *Kirby*'s analysis for determining when adversary judicial proceedings have begun. 399 U.S., at 9-10. The clear differences between the proceedings governed by *Coleman* and the article 15.17 appearance confirm that the article 15.17 appearance is not an event from which "counsel's absence might derogate from the accused's right to a fair trial." *Wade*, 388 U.S., at 226.

Coleman provided four reasons why an adversarial preliminary hearing, at which the State's evidence is evaluated for sufficiency to indict or otherwise formally file charges, is sufficient to initiate adversary judicial proceeding:

> (1) "the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over";
>
> (2) "the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of

> the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial";
>
> (3) "trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial"; and
>
> (4) "counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." 399 U.S., at 9.

The article 15.17 appearance allows no presentation of witness testimony and provides no opportunity to expose weaknesses in the government's evidence, create a basis for later impeachment, or even engage in basic discovery. Because "the prosecution is not required to produce witnesses for cross-examination" at the *Gerstein* probable-cause determination that accompanies magistration following a warrantless arrest, the considerations in *Coleman* that motivated recognition of the right to counsel at adversarial preliminary hearings do not apply at the article 15.17 appearance. *Gerstein*, 420 U.S., at 123.[10] Moreover, magistration "is addressed only to pretrial custody," and so "does not present the high probability of substantial harm" to the right to fair trial presented by a *Coleman* preliminary hearing, at which a finding of no probable cause "could mean that [a suspect] would not be tried at all." *Ibid.*

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[10] In Texas, the proceeding analogous to a preliminary hearing subject to *Coleman* is an examining trial, not the article 15.17 magistration.

Of the four bases identified in *Coleman* as justifying extension of the right to counsel, only one, counsel's ability to influence the decision to grant bail, is applicable to article 15.17 appearances. And because that rationale implicates the suspect's liberty interest, rather than his right to a fair trial, it is insufficient to justify the blanket extension of the right to counsel to the article 15.17 appearance. Indeed, to extend the right on that basis would require the extension of the right to counsel to *all* bail hearings. That would contradict the Court's suggestion that combining a bail hearing with a probable-cause hearing does not require appointment of counsel. *Gerstein*, 420 U.S., at 123-124; see *United States* v. *Hooker*, 418 F.Supp. 476, 479 (MD Pa. 1976), aff'd mem., 547 F.2d 1165 (CA3); *Fenner* v. *State*, 381 Md. 1, 20, 846 A.2d 1020, 1031 (2004); *Padgett* v. *State*, 590 P.2d 432, 436 (Alaska 1979); Colbert, Thirty-Five Years After *Gideon*: The Illusory Right to Counsel at Bail Proceedings, 1998 U. Ill. L. Rev. 1, 3. "[T]he fact that the outcome of a proceeding may result in loss of liberty does not by itself, even in civilian life, mean that the Sixth Amendment's guarantee of counsel is applicable."[11] *Middendorf* v. *Henry*, 425 U.S. 25, 35 (1976).

Rothgery's practical arguments against the proper application of *Kirby*'s pragmatic assessment are no more convincing than his doctrinal ones. Rothgery attacks a standard founded on commitment to

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[11] This conclusion is not altered by the fact that Rothgery had, and waived, a Texas statutory right to consult with counsel before his bail was set. See Tex. Code Crim. Proc. art 15.17(a). The existence of that statutory right does not indicate that the Sixth Amendment right to counsel had attached at the time of magistration.

prosecution as inherently unworkable, arguing that any such test would necessarily devolve into an "intrusive inquiry into prosecutors' deliberations and communications." Pet'r Br. at 38. But the properly formulated test is not, as in Rothgery's caricature, merely whether prosecutors have had any involvement in the case whatsoever, but instead whether the State has objectively committed itself to prosecute. *Kirby*, 406 U.S., at 689. Prosecutorial involvement is merely one form of evidence of such commitment. And *Kirby* provides other objective and easily employed benchmarks for gauging the State's commitment to prosecute: the filing of formal charges, whether by information, indictment, or formal complaint, or the holding of an adversarial preliminary hearing to determine probable cause to file such charges. *Ibid.* "The return of an indictment, or like instrument, substantially alters the relationship between the state and the accused. Only after a formal accusation has 'the government . . . committed itself to prosecute, and only then [have] the adverse positions of government and defendant . . . solidified.'" *Patterson*, 487 U.S., at 306 (Stevens, J., dissenting) (quoting *Kirby*, 406 U.S., at 689; alterations in original). In the mine-run of criminal cases, these gauges are all that is necessary to accurately indicate when adversary judicial proceedings have begun and the right to counsel attaches.

In any event, Rothgery's misguided pragmatic concerns are not implicated in this case. There clearly was no commitment to prosecute in Rothgery's case, as evidenced not only by the absence of formal charges but also by the prosecutor's lack of involvement in the preparation and filing of the affidavit of probable cause against Rothgery. Pet.

App. at 12 ("Without any evidence to indicate that the [probable cause] affidavit actually served to initiate the prosecution at the time of Rothgery's magistrate appearance, we conclude that the filing of the affidavit was part of the investigatory process, serving solely to validate the arrest without committing the state to prosecute."). Regardless of what some future case might require, the Fifth Circuit on these facts properly applied the *Kirby* test of governmental commitment to prosecution, and by that application correctly determined that Rothgery's right to counsel did not attach at or immediately following his article 15.17 magistration.

Whether considered as establishing a set of formal criteria, or a series of functional guideposts,[12] *Kirby* provides the fundamental framework for determining when a particular procedural step initiates adversary judicial proceedings[13]; and the analysis makes clear that the article 15.17 appearance does not qualify. Unless the arrest is made on an indictment or information, the article 15.17 appearance occurs before formal charges have been lodged, when the government is not yet committed to prosecuting the suspect and the arrestee is not confronted by the prosecutorial forces of society. Thus, under *Kirby*, an article 15.17 appearance following warrantless arrest

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[12] Commentators have recognized that the *Kirby* analysis has both a formal and a functional component. See Metzger, Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine, 97 Nw. L. Rev. 1635, 1689 (2003).

[13] *Kirby*'s careful consideration starkly contrasts with *Brewer* v. *Williams* and *Michigan* v. *Jackson*, which neither provide nor apply an analytical framework for determining attachment. See Part II.C *infra*.

does not trigger the attachment of the Sixth Amendment right to counsel.

C. Neither *Brewer* v. *Williams* nor *Michigan* v. *Jackson* Requires That the Right to Counsel Attach at an Article 15.17 Appearance Following Warrantless Arrest.

Against the great majority of this Court's Sixth Amendment cases, Rothgery suggests that the initiation of adversarial judicial proceedings is not defined by the government's commitment to prosecute because his magistration "was identical in every meaningful way to the initial 'arraignments'" in *Brewer* v. *Williams* and *Michigan* v. *Jackson*. Pet'r Br. at 11. But the opinions in those cases do not establish that the hearings described in *Brewer*'s dicta and *Jackson*'s one footnote addressing the attachment of the right to counsel are identical to Rothgery's magistration. Moreover, neither of those cases analyzed the nature of the "arraignments" with respect to the issue of attachment.

In *Brewer* v. *Williams*, the issue of whether the defendant's right to counsel had attached was neither raised by the parties before the Court nor disputed in the courts below. 430 U.S. 387, 399 (1977); see also *Williams* v. *Brewer*, 375 F.Supp. 170, 176 (SD Iowa 1974); Brief for Petitioner, No. 74-1263, 1976 WL 181163, at *3 (Feb. 12, 1976); cf. *Cobb*, 532 U.S., at 169 (saying, of *Brewer*, that "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue"). For that reason, *Brewer*'s factual statement is vague as to what occurred at the defendant's arraignment. And that means, in turn, that the question was not settled by

the *Brewer* opinion. Cf. *Adams* v. *Robertson*, 520 U.S. 83, 90-91 (1997) (*per curiam*) ("Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record."); *Metro. Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997) ("[T]hat is an issue not addressed by the parties, and it would be imprudent of us to address it now with any pretense of settling it for all time.").

From what we do know, however, it appears that the arraignment in *Brewer* differed from Rothgery's magistration. In *Brewer*, the defendant turned himself in to the police after an arrest warrant had issued charging him with child abduction. 430 U.S., at 390. The defendant was "arraigned" the same day he turned himself in. *Id.*, at 391; 375 F.Supp., at 172. Rothgery assumes that because "Williams had not yet been indicted and was not asked to enter a plea when he made his initial appearance before the court" and because he was "arraigned on a warrant" that this means the hearing was equivalent to Rothgery's magistration. Pet'r Br. at 21, n.8. But under Iowa law an arraignment can occur only after an indictment has been issued or a county attorney has filed an information. *Wright* v. *Denato*, 178 N.W.2d 339, 341 (Iowa 1970) ("Arraignment is a procedural right accorded defendants only after indictment (or the filing of a county attorney's information)."). Because Williams was "arraigned," the Court would likely have concluded or at least assumed that the prosecutor must have at least filed an information charging the defendant with child abduction. Although it is true that Williams had not yet been indicted for first-degree murder (for which

he was later convicted), *Brewer*, 430 U.S., at 393, neither the parties' briefs nor the courts' opinions reflect that the arrest warrant on which he was arraigned was not supported by a county attorney's information on the child-abduction charge for which he was originally arrested.

There is no basis in *Brewer* for Rothgery's assumption that Williams was not asked to enter a plea. The courts' opinions in *Brewer* do not state one way or the other whether he entered a plea, but they make clear that he was notified of the charge against him. 430 U.S., at 391; 375 F.Supp., at 172. That no other factual detail is provided is unsurprising given that the attachment issue was neither raised nor disputed by the parties. 430 U.S., at 399; 375 F.Supp., at 176.

The important point is that the uncertainty about what happened at the *Brewer* arraignment shows that its discussion of the attachment question is of limited, if any, precedential value. See *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) (stating that the Court is "not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"). Indeed, setting aside the requirements of Iowa criminal procedure, it is impossible to tell if the *Brewer* arraignment is more comparable to Rothgery's magistration or to the arraignment held to trigger the Sixth Amendment right to counsel in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961).[14] *Brewer*'s lack of clarity on this point is underscored by the fact that less than a year after

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[14] At the arraignment in *Hamilton* the defendant was required to raise certain defenses at the hearing or otherwise waive them. 368 U.S., at 53.

Brewer was decided, the Court did not even cite *Brewer* when analyzing whether adversary judicial proceedings had been initiated for Sixth Amendment purposes in *Moore* v. *Illinois*, 434 U.S. 220, 228 (1977). If *Brewer* were as clear as Rothgery assumes, *Moore* simply could have cited *Brewer* and easily concluded the hearing in *Moore* caused the right to counsel to attach. *Moore*, however, did not even mention *Brewer*. Grano, *Rhode Island* v. *Innis*: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions, 17 Am. Crim. L. Rev. 1, 29, n.172 (1979).

Equally misplaced is Rothgery's reliance on a single footnote in *Michigan* v. *Jackson*. 475 U.S. 625, 629, n.3 (1986). First, the primary question considered was whether the no-waiver rule of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), applies in the Sixth Amendment context to "a defendant *who has been formally charged with a crime*." *Jackson*, 475 U.S., at 626 (emphasis added). In *Jackson*, there was an arraignment that preceded the events at issue. There is no Texas arraignment procedure in the normal chronology leading to an article 15.17 appearance following a warrantless arrest, nor was there one in Rothgery's specific case. See Tex. Code Crim. Proc. art. 26.01 (defining arraignment under Texas law as a postindictment procedure).

The hearing that *Jackson* said initiated adversarial judicial proceedings differed in two critical respects from Rothgery's magistration. First, it gave the defendant the right to answer the charges—under Michigan law, the defendant in *Jackson* had to "be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer." Mich. Comp. Laws §764.26

(quoted in *People* v. *Mallory*, 421 Mich. 229, 238-239, 365 N.W.2d 673, 677 (1984)). Article 15.17, on the other hand, does not provide any similar opportunity to speak or answer questions regarding the charge. Second, at the hearing in *Jackson*, the court entered a plea of not guilty on behalf of the defendant. Brief for Petitioner, No. 84-1539, 1985 WL 669876, at *3-*4 (July 12, 1985). No plea was entered (or even allowed) at Rothgery's appearance.

D. Rothgery's Waiver of Counsel at the Preindictment Article 15.17 Appearance Eliminated Any Right to Appointment Until a Subsequent Critical Stage.

Rothgery's knowing and intelligent waiver of the right to counsel obviated the need for appointment of counsel at the Article 15.17 appearance. And, because no proceedings or interrogations occurred between the preindictment and postindictment article 15.17 appearances, no intervening event required appointment to protect Rothgery's right to a fair trial. Thus, the County had no constitutional obligation to appoint counsel for Rothgery before it did so.[15]

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[15] Rothgery attempts to frame the question presented to this Court solely in terms of attachment, without reference to appointment. But Rothgery's constitutional claim is not that the County prevented his right to counsel from attaching, but that it violated his Sixth Amendment right by not appointing him counsel. Compl. at 8-9. And this Court's prior cases uniformly have addressed whether the right was violated by deciding whether it was necessary to appoint counsel in the context of specific proceedings and events, not by deciding abstract questions about attachment. Indeed, Rothgery's own argument relies substantially on emotional arguments about the timing of appointment, as do his amici. *E.g.*, Pet'r Br. at 37,

Kirby and its progeny make clear that the right to counsel requires appointment of counsel only at critical stages of criminal proceedings: the filing of a formal charge, the occurrence of an adversarial preliminary hearing or arraignment, or an interrogation or lineup that follows the government's demonstration of its commitment to prosecute.[16] See *Kirby*, 406 U.S., at 689; *Gouveia*, 467 U.S., at 188-189; *Jackson*, 475 U.S., at 629-630. The critical-stage analysis considers whether "counsel is necessary to preserve the defendant's basic right to a fair trial," focusing on events that can prejudice the fair-trial right. *Wade*, 388 U.S., at 227. Counsel must first be appointed before she can be present at a critical stage, to allow time to prepare to meet her prosecutorial adversary. *E.g.*, *Avery*, 308 U.S., at 446. But the Court has never held, as Rothgery

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40, 43 (arguing that Rothgery and others like him would be disadvantaged without the assistance of counsel); see also Brief of Amicus Curiae Twenty-Four Professors of Law at 4; Brief of Amicus Curiae NACDL at 24-25; Brief of Amicus Curiae Brennan Center for Justice, *et al.* at 25 (all discussing the issue in terms of right to a lawyer); Pet. App. at 12 (Fifth Circuit recognizing connection between attachment and appointment). Thus, the question whether appointment is required immediately upon attachment is not only "fairly included in the question presented," the questions are so intertwined that the issue is "essential to the correct disposition of the other issues in the case." *Missouri* v. *Jenkins*, 515 U.S. 70, 84-85 (1995) (quotation omitted).

[16] The statement in *Jackson* on which Rothgery so heavily relies is not to the contrary. See 475 U.S., at 629, n.3. In context, *Jackson*'s assertion is simply a recognition that the Court was not considering and did not rely on the question whether arraignment under Michigan law constituted a critical stage at which the accused had a right to the presence of counsel. *Ibid.*

presupposes, that, even with no critical stage impending, there is a bright-line rule requiring that counsel be appointed at the moment that the right has attached.

When an accused waives the right to counsel at a given event, as Rothgery did at the article 15.17 appearance, that waiver eliminates any obligation to appoint counsel, because by that waiver the suspect accepts the risk of whatever prejudice to his fair-trial right may inhere at that stage. This means, in turn, that appointment is not constitutionally required until the next point at which the accused risks "potential substantial prejudice" to the "basic right to a fair trial." *Wade*, 388 U.S., at 227. The Court has rightly refused to find that an accused has any right to appointment of counsel in the absence of any of the concerns that motivate the right to counsel, particularly in light of the substantial burden doing so would impose on pending investigations by the police. See *Gouveia*, 467 U.S., at 191 (refusing to adopt a "novel interpretation of the right to counsel" to "provide a defendant with a preindictment private investigator"); *Cobb*, 532 U.S., at 171-172 (noting that "the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects"). The period between Rothgery's first and second article 15.17 appearances was just such a time—none of those concerns were present, because there was no intervening event posing any "potential substantial prejudice" to Rothgery's right to a fair trial until the indictment, which was followed by the

County's timely appointment of counsel to represent Rothgery.[17]

Rothgery claims that despite his waiver, his preindictment article 15.17 appearance entitled him to precisely that "preindictment private investigator" that *Gouveia* said he should not get. 467 U.S., at 191. He claims, despite his own waiver, that he had the right to have counsel appointed at a time when nothing was going on. Yet he offers no coherent explanation how, if appointment of counsel was not required at the appearance (either because of his waiver or the appearance's nonadversarial character), it was nonetheless required *after* the hearing, when none of the risks and concerns which motivate the right to counsel were present. See Pet'r Br. at 19-20, n.6 ("The question presented by this case . . . [is] whether Rothgery's initial appearance before the magistrate marked the commencement of adversary judicial proceedings, *after which* his right to counsel attached." (emphasis added)).

The Court has never held that the proceedings at a particular pretrial event can trigger appointment of counsel without the hearing itself being a critical stage. See, *e.g.*, *Coleman*, 399 U.S., at 9-10 (holding that potential prejudice to fair-trial right requires counsel at preliminary hearing); *Hamilton*, 368 U.S., at 54 (same at arraignment). Yet Rothgery is in essence asking the Court to hold that the article 15.17 appearance is a critical stage causing attachment of the right to counsel despite his

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[17] Rothgery essentially seeks to have this period of inactivity treated as a critical stage. See Pet'r Br. at 19, n.6. But the complete absence of any proceedings could not be a critical stage without robbing that phrase of all meaning.

strenuous denial (presumably because of the blunt fact of his waiver) that the question of attachment at the article 15.17 appearance itself is before the Court. In short, the fact of Rothgery's waiver makes this the wrong case in which to decide, as Rothgery seeks, whether an article 15.17 appearance always requires appointing counsel.

Even taken on its own terms, Rothgery's argument necessarily recognizes some gap between the initiation of adversary judicial proceedings, which he claims occurred at the preindictment article 15.17 appearance, and the proper time for appointing counsel. But he offers no justification for his unstated and critical assumption that the time between these two events must be vanishingly small. And that assumption is at odds with the Court's "more pragmatic approach" to Sixth Amendment jurisprudence. *Patterson*, 487 U.S., at 298. Instead, when adversary proceedings begin at an event at which the accused expressly waives counsel, the gap between attachment and appointment naturally lasts until the next critical stage, when the risk for prejudice to the fair-trial right next arises. Put another way, whether Rothgery had a right to demand immediate appointment of counsel after the article 15.17 appearance depends on "whether potential substantial prejudice to [Rothgery's] rights inhere[d]" at that point, and whether the availability of counsel could help to avoid that prejudice. *Wade*, 388 U.S., at 227.

No potential prejudice, let alone substantial prejudice, to Rothgery's right to a fair trial, inhered in the gap between his preindictment and postindictment article 15.17 appearances. His lack of counsel had no impact on "his right meaningfully to

cross-examine the witnesses against him [or] to have effective assistance of counsel at the trial itself." *Wade*, 388 U.S., at 227. There is therefore no basis to arbitrarily determine that appointment was required the instant the article 15.17 appearance concluded. Instead, the Court's right-to-counsel analysis dictates that counsel need not be appointed until the next critical stage at which Rothgery's right to a fair trial might be put at risk. See *ibid.*

The Texas legislature, moreover, carefully mirrored the Court's analysis in crafting Texas's appointment statute. See Tex. Code Crim. Proc. art. 1.051. For indigent defendants not released on bail, the statute requires appointment even prior to initiation of adversary judicial proceedings. *Id.* art. 1.051(i). For those indigents released from custody, however, the statute does not require appointment of counsel until the first court appearance, or the initiation of adversary judicial proceedings (whichever comes first). *Id.* art. 1.051(j). Rothgery's claim that counsel must be appointed at magistration nullifies article 1.051(j), because under Rothgery's theory every time an arrestee is magistrated and admitted to bail, adversary judicial proceedings are initiated.

Rothgery waived any Sixth Amendment right to counsel he may have had at the preindictment article 15.17 appearance, and appointment was appropriate at the second, postindictment article 15.17 appearance. The delay in appointing counsel therefore did not violate Rothgery's Sixth Amendment right to counsel.

This conclusion is not altered by Rothgery's claim that *Michigan* v. *Jackson* requires appointment to follow attachment irrespective of whether any critical stage has or is soon to occur. Rothgery points to an

equivocal footnote in *Jackson*, in which the Court wrote, while holding that the right to counsel attaches at arraignment, that "[t]he question whether arraignment signals the initiation of adversary judicial proceedings . . . is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel, absent a valid waiver." *Jackson*, 475 U.S., at 629, n.3. But this statement says nothing about whether attachment requires immediate appointment. And in fact *Jackson* rejects any notion that appointment should be detached from critical stages.

The question in *Jackson* was whether counsel was required at an interrogation after an arraignment, when the accused had asserted the right. *Id.*, at 636. The defendants did not argue that counsel should have been appointed for the period between arraignment and interrogation. Instead, *Jackson* adopts the view that post-arraignment interrogation itself constituted a "critical stage" that activated the right to counsel that had been dormant since it attached at the arraignment. *Id.*, at 629-630. The Court subsequently confirmed this understanding that a defendant's Sixth Amendment right can attach without counsel actually being appointed, so long as no critical stage occurs: "The fact that petitioner's Sixth Amendment right came into existence with his indictment, *i.e.*, that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned." *Patterson*, 487 U.S., at 290-291.

The latent nature of the right to counsel between the initiation of adversary judicial proceedings and the first critical stage of those proceedings finds

support in common practices in the American criminal justice system that have never been seriously questioned. On Rothgery's logic, for instance, appointment of counsel would automatically occur upon indictment, when attachment of the right to counsel is abundantly clear. But there is no doubt that there is no responsibility to appoint counsel to an indicted fugitive even though the right to counsel has clearly attached, and it is no violation of his constitutional rights to delay appointment until after his apprehension. Similarly, while the right to counsel attaches upon return of a sealed indictment, appointment of counsel is not required until the indictment is unsealed unless a critical stage, such as interrogation, intervenes. See *United States* v. *Arnold*, 106 F.3d 37, 41 (CA3 1997), overruled on other grounds by *Cobb*, 532 U.S., at 168.

The Sixth Amendment right to appointment of counsel is triggered only by a critical stage of proceedings (including interrogation) following the initiation of adverse judicial proceedings. No critical stage (not even an attempted interrogation) intervened during the period between Rothgery's preindictment magistration and the return of the indictment against him. Thus, even if the right could be said, in a hypertechnical sense, to have "attached" at or after the article 15.17 appearance, nothing happened at or after that hearing that required the appointment of counsel until Rothgery was actually indicted—at which point counsel was timely appointed.

III. ROTHGERY'S PROPOSED EXTENSION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL IS UNWARRANTED, UNWORKABLE, AND UNWISE.

The rule proposed by Rothgery, that the Sixth Amendment right to counsel attaches whenever "an arrested person makes an initial appearance before a judge who informs him of the accusation against him and requires him to remain in jail or post bail to ensure that he answers that accusation," Pet'r Br. at 20, would have far-reaching negative consequences both for legal doctrine and in real-world practice. It would unnecessarily disrupt this Court's well-considered and well-understood framework defining the right to counsel, in order to safeguard an already-protected liberty interest not traditionally part of Sixth Amendment analysis. It would invite vexatious litigation, including interlocutory appeals, habeas corpus claims, and §1983 suits under circumstances in which no quantifiable injury has occurred. And it would impose significant, unnecessary costs on governmental entities forced to pay for defense lawyers even in the absence of criminal proceedings against a suspect.

A. Rothgery's Proposed Rule Would Conflict with This Court's Sixth Amendment Precedents.

The Fifth Circuit's determination that Rothgery's right to counsel did not attach at his preindictment article 15.17 appearance is entirely congruent with relevant Sixth Amendment precedents. See Part II *supra*. Rothgery's arguments, in contrast, directly contradict several longstanding precedents interpreting the States' obligations under the Sixth Amendment.

In particular, because Rothgery's proposed rule would extend the right to counsel to any probable-cause hearing before a magistrate, it directly contradicts *Gerstein*'s indication that counsel need not be appointed at a nonadversarial probable-cause hearing. See 420 U.S., at 122-124. Rothgery's proposed rule would also essentially overrule *Kirby* v. *Illinois*. *Kirby*'s core holding was that there is no right to counsel at investigatory lineups conducted prior to the initiation of adversary judicial proceedings. 406 U.S., at 690. But the standard nationwide practice is to bring arrestees before a magistrate within 24 to 48 hours of arrest. 4 W. LaFave *et al.*, Criminal Procedure §14.2(a), n.5 (2d ed. 1999). Thus, if Rothgery's rule were to be adopted, counsel *would* be required for any investigatory lineups after a magistration—that is, routinely.

Rothgery's position also clashes with *Scott* v. *Illinois*. Under *Scott*, "the Federal Constitution does not require a state trial court to appoint counsel" in a "case where a defendant is charged with a statutory offense for which imprisonment upon conviction is authorized but not actually imposed." 440 U.S., at 369. But Rothgery's proposed blanket rule is that the right to counsel attaches at the point of an initial appearance regardless of whether the defendant has been charged with a felony, and is violated by a failure to appoint counsel at that point regardless of whether imprisonment is ultimately imposed. Indeed, in Rothgery's case, the State, through the prosecutor, had the discretion to decide to charge him with the misdemeanor of unlawful possession of a firearm and not seek jail time. Tex. Penal Code §46.02; *id.* §12.21 (allowing imposition of a fine only). Rothgery's rule would cramp that discretion, and

contradict *Scott*, by forcing the State to appoint a lawyer before it had even decided either to prosecute him for a felony or seek jail time.

Similarly, Rothgery's rule would also breathe new life into the Sixth Amendment reading of *Escobedo*, 378 U.S., at 485-486, which extended the right to counsel to preindictment interrogations, even though that understanding of *Escobedo* was subsequently repudiated by *Johnson* v. *New Jersey*, see *Moran*, 475 U.S., at 429. In doing so, moreover, Rothgery's rule would also functionally adopt *Miranda*'s repudiated holding that "custodial interrogation [marks] the true beginning of adversarial proceedings." *Gouveia*, 467 U.S., at 194 (Stevens, J., concurring in the judgment); *Moran*, 475 U.S., at 429-430 ("[S]ubsequent decisions foreclose any reliance on *Escobedo* and *Miranda* for the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings.").

B. The Liberty Interest Rothgery Seeks to Vindicate Is Properly and Adequately Protected by Other Constitutional and Statutory Rights.

Worse still, these disruptions of well-settled precedent are unnecessary, because the interests Rothgery seeks to protect are already adequately protected by other rights. At its core, Rothgery's claim appeals to the notion that he should not have had to wait the intervening five months while out on bail to be appointed a lawyer, but instead should have had a lawyer appointed to begin investigating the background facts underlying the possible charges

against him.[18] As explained, that is not an interest the Sixth Amendment right to counsel protects. Rothgery also leans heavily on the concern that "[u]nder [the Fifth Circuit's] rule, an indigent defendant who is innocent of the charges against him could nevertheless sit in jail for months awaiting indictment 'because he does not know how to establish his innocence.'" Pet'r Br. at 42. That is, Rothgery urges the Court to look beyond the circumstances of his own case and extend the right to counsel to protect a general liberty interest against preindictment confinement. But other protections already combine to prevent that harm of which Rothgery warns.

First, the Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const., Amdt. 4. This Court specifically approved in *Gerstein* the situation in which "a person [is] arrested and *held for trial*" upon a showing of probable cause, even when such detention amounted to an "extended restraint of liberty following arrest."[19] 420 U.S., at 111, 114 (emphasis added). And it is beyond dispute that "the Government has a substantial interest in

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[18] In particular, Rothgery invites the Court to consider a secondhand anecdote claiming that a person spent 27 days in jail before counsel was appointed. Pet'r Br. at 42 (describing a "story told" to the authoring committee). This purported event occurred before the enactment of the Texas Fair Defense Act of 2001, which requires the appointment of counsel to indigents held in jail. Tex. Code Crim. Proc. art. 1.051(i). And the concern Rothgery raises about people languishing in jail without lawyers is inapposite to this case, as Rothgery was free on bail during the period he claims that the County was constitutionally required to appoint him a lawyer.

[19] The existence of probable cause to detain Rothgery at the time of his initial arrest is uncontroverted.

nsuring that persons accused of crimes are available for trials . . . or that confinement of such persons pending trial is a legitimate means of furthering that interest." *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979). Adapting the Sixth Amendment right to counsel to protect a suspect's liberty interest in these circumstances would thus extend the Sixth Amendment right to counsel even beyond the bounds of the Fourth Amendment.

Next, the Sixth Amendment separately ensures the right to a speedy trial. .That guarantee provides another important defense for a suspect's liberty, acting "to prevent undue and oppressive incarceration prior to trial" and "to minimize anxiety and concern accompanying public accusation." *United States* v. *Marion*, 404 U.S. 307, 320 (1971). The degree of overlap between these stated goals and the harms alleged by Rothgery is noteworthy, because in essence Rothgery is attempting to assert a speedy trial claim that would normally be barred. See *Doggett* v. *United States*, 505 U.S. 647, 652, n.1 (1992) (noting that postaccusation delay is not generally considered presumptively prejudicial less than a year after triggering the right to a speedy trial). But, again, "the speedy trial right and the right to counsel protect different interests. While the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor, the speedy trial right exists primarily to protect an individual's liberty interest," like the interest Rothgery asserts here. *Gouveia*, 467 U.S., at 190. Rothgery's argument implicitly reconceptualizes the purpose of the Sixth Amendment right to counsel, so that it no longer focuses on protecting the right to a fair trial, but on protecting the liberty interests of the accused—which already fall within the ambit of

the right to a speedy trial. That "fundamentally misconceive[s] the nature of the right to counsel guarantee." *Id.*, at 189.

Moreover, state statutes of limitations, in addition to federal constitutional rights, safeguard against unreasonable delay in prosecuting criminal cases. "[T]he applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges," and such statutes likewise guarantee an upper limit on the possible duration of any preindictment detention. *Marion*, 404 U.S., at 322 (quoting *United States* v. *Ewell*, 383 U.S. 116, 122 (1966)). More directly applicable are state-law speedy trial guarantees, such as Article 32.01 of the Texas Code of Criminal Procedure, which requires dismissal of charges and discharge from custody or bail if formal charges are not filed within 180 days or the end of the first term of court after arrest (whichever is later).

Finally, state statutes also specifically secure the right to counsel to persons held in custody. See Brief of Amicus Curiae NACDL at 1a-7a. Under Texas law, the magistrate will inform an arrestee of his right to counsel and, if counsel is requested, will appoint counsel before the bail-setting portion of the magistration is conducted. Tex. Code Crim. Proc. art. 15.17(a). Further, the Texas Fair Defense Act provides that an indigent person in a rural county is entitled to have counsel appointed within three working days after counsel is requested. *Id.* art. 1.051(i).[20] If an arrestee chooses not to postpone the setting of bail to await the appointment of counsel,

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[20] In counties with more than 250,000 people, counsel must be appointed within one working day of the request. *Id.* art. 1.051(i).

the arrestee may (as Rothgery did) waive his statutory right to counsel at the magistration without prejudicing his later right to request the appointment of counsel at subsequent judicial proceedings. *Id.* art. 1.051(h).[21]

In short, several protections combine to fend off Rothgery's specter of innocent indigents languishing in Texas county jails for lack of appointed counsel. "[P]retrial delay is often both inevitable and wholly justifiable," *Doggett*, 505 U.S., at 656, and the existing procedural protections are sufficient (and designed) to protect suspects from an unreasonable detention, a delay in prosecution, or a combination of the two. And, just as important, "the major evils" against which these protections guard "exist quite apart from [the] actual or possible prejudice to an accused's defense" which motivates the right to counsel. *Marion*, 404 U.S., at 320. Because of the adequacy of existing constitutional and statutory protections, there is no need to deform the right to counsel to serve a liberty interest it was not designed to safeguard.

C. Rothgery's Proposed Extension of the Right to Counsel Would Open the Door to Future Undesirable Extensions of That Right.

Rothgery's proposed alteration to the scope of the right to counsel would open the door to further

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[21] The purported differences between Texas's procedures from other states cannot justify constitutionalizing the majority practice. See *Estes* v. *Texas*, 381 U.S. 532, 587 (1965) (Harlan, J., concurring) ("Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation.").

extensions even to the time of arrest. First, his logic clearly would make the right applicable to a bail hearing. It makes no sense to think that the right to counsel must attach *following* a judge's commitment of a suspect to bail in order to protect that suspect's liberty interest, without also concluding that protecting that liberty interest likewise requires the presence of counsel *at* the bail hearing.

Moreover, reconfiguring the Sixth Amendment right to counsel as a protector of liberty interests, rather than of the right to a fair trial, makes Rothgery's proposed extension a jumping-off point for many new procedural rights and prophylactic rules untethered from the text and purpose of the Amendment itself. For example, Rothgery's logic could easily be extended past the bail hearing to the point of arrest on a warrant. Rothgery's theory is that the right attaches when there is a judicial determination of probable cause to believe a specific offense has been committed, with communication of that offense to the suspect, and the judicially sanctioned imposition of restrictions on the suspect's liberty. Pet'r Br. at 20.[22] Rothgery here contends that the probable-cause determination is important only because it requires a magistrate to inform the accused of the charge against him, but nothing in Rothgery's theory can distinguish that judicial hearing in the defendant's presence from an ex parte judicial determination of probable cause preceding

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[22] See also Brief of Amici Curiae Twenty-Four Professors of Law at 21, n.5 ("It is the judicial determination of probable cause which is constitutionally required for significant pretrial restraints on liberty, that initiates adversary judicial proceedings, and which therefore causes the right to counsel to attach.").

issuance of an arrest warrant. Such a warrant, after all, must inform the arrestee of the offense he is believed to have committed. See Tex. Code Crim. Proc. art. 15.02(2). So Rothgery's relevant conditions exist at the moment a suspect is arrested on an arrest warrant that was issued by a judge. While this is not the argument Rothgery makes now, accepting his theory would guarantee that it soon would be advanced, with no logical reason to reject it.

D. Rothgery's Proposed Expansion of the Right to Counsel Would Create Significant Practical Problems for Law Enforcement and Local Government.

Rothgery's proposed expansion of the scope of the right to counsel would create very significant practical detriments for law enforcement and local government. Moreover, those detriments would far outweigh the benefits Rothgery contends would be realized by a small number of criminal defendants.

First, extending the right to counsel to any initial appearance before a magistrate will inspire significant amounts of vexatious litigation. Denial-of-counsel claims will proliferate on direct appeal, raising thorny issues about whether the absence of appointed counsel during a period of inactivity prior to the filing of a case should be considered harmless error. See, *e.g.*, *Coleman*, 399 U.S., at 11. More troubling, Rothgery's proposed extension of the right to counsel would invite the filing of federal habeas corpus claims by any unindicted suspect in custody, demanding a lawyer to prevent the filing of formal charges. In particular, if misdemeanor charges are a possibility, those claims conflict with *Scott* v. *Illinois*, because no right to counsel arises vis-à-vis those

charges unless imprisonment is imposed. 440 U.S., at 369. Rothgery's extension will also create the prospect of numerous tendentious claims for damages under §1983 from suspects like Rothgery, who connect their lack of appointed counsel to unspecified damages stemming from their detention, even though they could point to no prejudice sufficient to provide them with a right to relief under the Fourth Amendment or the Sixth Amendment's right to a speedy trial. Until now, the Court has never recognized any such §1983 claim for damages based on an untimely appointment of counsel.

Adopting Rothgery's theory will also work serious practical harms on law-enforcement efforts to investigate and prevent crimes. Any extension of the right to counsel into new contexts undeniably hampers police investigations. "In seeking evidence pertaining to pending charges, . . . the Government's investigative powers are limited by the Sixth Amendment rights of the accused." *Maine* v. *Moulton*, 474 U.S. 159, 179-180 (1985). Every expansion of the right to counsel eliminates additional scenarios under which police can question, record, speak with, or even just overhear a suspect without inadvertently violating his constitutional rights and jeopardizing a future prosecution. *E.g.*, *Fellers* v. *United States*, 540 U.S. 519, 524-525 (2004); *Moulton*, 474 U.S., at 176-177 & 177, n.14.

In addition, providing counsel to every indigent defendant at his initial appearance will multiply administrative complexity. Magistration is often an informal, bureaucratic step in processing arrestees, as it was in Rothgery's case. See SJ Opp. Ex. 3 at 62, 64 ("[W]hen they were taking my pictures and everything, I turned around to a little glass window

and talked to a magistrate"; "I spoke to him through the window, and that's when I filled all the paperwork out."). The presence of counsel would add little but inefficiency to such a process, even to the extent of potentially forcing the prosecutor to be on hand for all probable-cause determinations to argue any challenges offered by appointed counsel, even though such a determination is not constitutionally required to be adversarial. See *Gerstein*, 420 U.S., at 119-120; see also *Ash*, 413 U.S., at 317 (rejecting constructions of the right to counsel that "produce confrontation at an event that was not previously analogous to an adversary trial").

Finally, an extension of the right to counsel would impose substantial costs on local governments responsible for appointing counsel. And the additional costs of providing each indigent defendant "with a preindictment private investigator," *Gouveia*, 467 U.S., at 191, would be substantial. Incurring these expenses to protect the handful of indigent defendants who can conclusively prove their factual or legal innocence before indictment from a pretrial detention period fully justified under the Fourth Amendment would be a short-sighted and inefficient use of limited governmental resources. Such suspects can properly invoke other constitutional and statutory protections of their liberty; there is no basis "to wrench the Sixth Amendment from its proper context" of protecting defendants' right to a fair trial. *Marion*, 404 U.S., at 322.

Neither the practical nor the doctrinal consequences of Rothgery's proposed alteration of the right to counsel can be justified by the concerns for fairness and balance in the criminal justice system that have traditionally driven Sixth Amendment

analysis. And the impact of this change would be significant, broadly felt, and, on balance, damaging both to governmental institutions charged with enforcing the laws and society's interest in solving and preventing crimes. Accordingly, this Court should reject the extension Rothgery proposes, and retain the line drawn by its well-considered precedents.

CONCLUSION

For these reasons, the Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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